Editor's note: 99 I.D. 20

ENRON OIL & GAS CO.

IBLA 90-47 Decided February 26, 1992

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming the requirement that rights-of-way be secured by a Federal oil and gas lessee for the construction of lateral lines on Federal leases. WYW-48907, etc.

Set aside and remanded.

1. Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

The Mineral Leasing Act, as implemented by Departmental regulations, does not require rights-of-way for construction and operation of "production facilities." In the case of gas, under 43 CFR 2880.5(k), production facilities include a lessee's or lease operator's gathering lines which are located on lease upstream from the point of delivery to a transportation pipeline.

2. Oil and Gas: Pipelines: Rights-of-Way--Regulations: Force and Effect as Law--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas
Pipelines

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

3. Oil and Gas: Pipelines: Rights-of-Way--Regulations: Force and Effect as Law--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas
Pipelines

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

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OPINION BY ADMINISTRATIVE JUDGE HUGHES

Enron Oil & Gas Company (Enron) appeals from an August 31, 1989, decision of the Wyoming State Office, Bureau of Land Management (BLM), affirming an August 2, 1989, letter decision of the Pinedale, Wyoming, Resource Area Office, BLM, informing Enron that rights-of-way would be required for the construction of eight "lateral lines" on five Federal oil and gas leases situated in Sublette and Lincoln Counties, Wyoming. 1/

1/ These leases are WYW-48907, WYE-09561-A, WYE-021741, WYW-041447, and WYE-08051-A.

These leases were issued under authority of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 181-287 (1988). This appeal concerns whether Enron is required by section 28(a) of the MLA, as amended, 30 U.S.C. § 185(a) (1988), to obtain rights-of-way for the lateral lines. 2/

Enron filed eight Sundry Notices on July 31, 1989, proposing to construct lateral lines on eight gas leases. 3/ By filing Sundry Notices, Enron effectively sought permission to construct these lateral lines under authority granted to it by the leases, rather than applying for separate rights-of-way under authority of section 28(a) of the MLA. The record indicates that the purpose of each lateral line is to transport wet, unprocessed gas from an individual wellhead to a "gathering system" interconnection on each lease. The gathering system is owned by Northwest Pipeline Corporation (Northwest). 4/ The unprocessed gas is then to be transported to Northwest's "central trunk line" and, thence, to Northwest's gas processing plant in Opal, Wyoming.

The points of interconnection of the lateral lines to Northwest's gathering system are all located within the boundaries of the respective

2/ The present provisions of section 28(a) were enacted by section 101 of the Act of Nov. 16, 1973, P.L. 93-153, 87 Stat. 576.

3/ The eight wells are the North LaBarge 43-5, South Hogsback 12-4, South LaBarge 1-4, Green River Bend Unit 94-27, North LaBarge 55-17, South Hogsback 21-4, South LaBarge 4-33, and Green River Bend Unit 99-27.

In addition to the eight lateral lines from these wells, Enron represents that it has embarked upon a well expansion program that anticipates drilling approximately 200 wells on these leases.

4/ By referring to Northwest's "gathering system," we do not hold or imply that the gathering system line is a "gathering line" within the meaning of the regulations.

leases. Thus, the lateral lines from the individual wellheads to the Northwest gathering system are also located entirely within the boundaries of the respective leases. It is undisputed that Enron owns the lateral lines.

According to the Sundry Notices, the pipe for each line was to be 4-inch internal diameter, and the length of each line varied according to the lease on which it was to be built, from 200 feet to 3,200 feet in length. The Area Office returned these Sundry Notices to Enron unapproved along with a letter dated August 2, 1989, notifying Enron that the lateral lines would require separate rights-of-way. The Area Manager noted that all of the sales meters on the affected wells are at the wellhead, thus making each lateral line a "facility transporting gas downstream from the custody transfer station (sales meter)." The letter cited BLM Manual 2801.32.C.1.g.(2), which states that rights-of-way are required for "that portion of the facility which occurs downstream from the sales (custody transfer) point (whether on or off lease)," and concluded that the lateral lines would require rights-of-way.

Enron expressly declined to have its Sundry Notices treated as applications for rights-of-way, and instead subsequently notified the Area Office by telephone that the meters at the wellheads are not "purchase meters," but are instead merely to determine volume. Enron also advised BLM that the gas is not sold until after it is processed in Opal, Wyoming. The Area Office did not alter its decision not to accept the Sundry Notices, and Enron requested State Director review of the Area Office's action under 43 CFR 3165.3(b).

On review, Enron advised the State Director as follows:

> Enron had previously sold its gas at the wellhead to Northwest. The responsibility for installing lateral lines such as those at issue was Northwest's because Northwest was required to take delivery of the gas at the wellhead. Northwest applied for and obtained rights-of-way for this purpose. Under this arrangement, it was also clear that the point of sale and the point of transfer of custody of the gas in question was at the wellhead. However, effective February 1, 1989, Enron and Northwest renegotiated their agreements relative to the sale of gas from these fields, which covers [sic] the wells described above. [5/] Under the renegotiated agreement, Enron installs and owns the lateral lines from the wellhead to a specified connection point on Northwest's existing gathering system. Northwest operates the facilities installed by Enron for the connection of the wells to Northwest's gathering system. The gas is delivered through Northwest's gathering and transportation facilities to Northwest's processing plant. Enron sells the gas at the plant tailgate. Enron pays Northwest a combined transportation and processing fee, and extracted liquids are divided between Northwest and Enron in a pre-determined manner. Northwest never purchases this gas.

(Enron's Aug. 17, 1989, Letter to State Director at 2-3). Enron also indicated that the purpose of the wellhead meter is not to identify the point of sale, but "to determine the amount of production from each well so that plant output can be properly allocated for royalty purposes" and "to calculate the transportation portion of Northwest's fee." Enron stressed that it owns the lateral lines and "maintains the responsibility for them under BLM operating regulations." Enron concluded that "it owns the right to construct such laterals under the terms of its leases, subject only to the surface management responsibility of BLM," so that no rights-of-way are required for the lateral lines. Id. at 3.

5/ It is not clear whether there is more than one agreement between Enron and Northwest concerning transportation of production from these leases.

However, Enron also stated that Northwest "accepts gas for delivery at the wellhead." Id. at 3. This statement (which Enron repeats on appeal) apparently conflicts with Enron's assertions that it owns the lateral lines, as it is not clear how a party other than the owner of a pipeline would be in a position to accept delivery of gas at the head of that pipeline. We further address this question below.

On August 31, 1989, the State Director, Wyoming State Office, BLM, issued his decision affirming the Area Office's rejection of the Sundry Notices and requiring Enron to secure rights-of-way for its lateral lines. 6/ This decision characterized the issue as "whether the pipelines requested require rights-of-way or are permissible as 'production facilities' under the oil and gas lease terms" (Decision at 1). Although the decision cited nothing, it is evident that BLM was referring to 43 CFR 2880.0-5(i), which provides that the type of "pipeline" for which a right- of-way must be secured under section 28(a) of the MLA does not include "lessee's or lease operator's production facilities located on his lease." The regulations provide in turn, in the case of gas, that "production facilities" include storage tanks, processing equipment, and gathering lines upstream from the point of delivery. 43 CFR 2880.0-5(k).

BLM's decision characterized Enron's position as follows: "[Enron's] letter requesting the review argues that the rights-of-way are not required because they would be entirely within lease boundaries and are upstream of

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6/ The decision was signed by the Acting Deputy, Division of Mineral Resources, Wyoming State Office, BLM.

the production accounting measurement point" (Decision at 2). The decision further stated that "[t]he issue is the location of the approved production accounting measurement point," and went on to hold that, since BLM had not approved the renegotiated contract between Enron and Northwest providing otherwise (as provided by the regulations), 7/ the production accounting measurement point was still on the lease. Id. The decision suggested that "the pipelines would be approvable as 'production facilities' if [BLM] agreed to [a] change in production accounting measurement points to match the contract agreement." Id.

Thus, although it did not expressly so state, it appears that the basis for the State Director's decision to require rights-of-way for the lateral lines was as follows: The "approved production accounting measurement point" was at the wellhead, notwithstanding the renegotiation of the contract between Enron and Northwest, as BLM had not approved the use of any other point. This production accounting measurement point was also the "sales (custody transfer) point" under BLM Manual 2801.32.C.1.g.(2) or "point of delivery" within the meaning of 43 CFR 2880.0-5(k). The lateral lines are located downstream from the "approved production accounting measurement point" and, therefore, were not production facilities, so that rights-of-way were required to be secured for them under the BLM Manual.

On appeal, Enron relies on a Solicitor's opinion, issued in 1980 and endorsed by the Secretary of the Interior, entitled Right-of-Way

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7/ Again, the decision did not cite any regulations, but it is evident that BLM was referring to 43 CFR 3162.7-3.

Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas Leaseholds (Solicitor's Opinion), M-36921, 87 I.D. 291 (1980), and the regulations at 43 CFR 2880.0-5 defining "pipeline" and "production facilities." Enron argues that it has already been granted the right to construct these lateral lines by holding Federal oil and gas leases, which grant to it the "right to occupy so much of the surface as is reasonably necessary to conduct its operations under the lease" (Statement of Reasons at 2). 8/ It argues that it was not required to secure rights- of-way under the regulations because it owns the lateral lines, which are located within its lease boundaries and qualify as "production facilities." Further, Enron maintains that the lateral lines are upstream of the point of delivery under the regulations because Enron does not transfer custody of the gas until the interconnection with Northwest's gathering lines and does not sell the gas until the tailgate of the processing plant in Opal, Wyoming. Enron repeats that it maintains the responsibility for the lateral lines under BLM operating regulations and stresses that, until the gas connects to Northwest's gathering system, the entire risk of loss remains with Enron. Thus, Enron argues that, under Departmental regulations, BLM Manual 2801.32.C.1.g.(1) through (3), and Solicitor's Opinion, supra, no rights-of-way were required.

Relying essentially on the same authority as Enron, BLM contends that the issue whether a right-of-way is required on Enron's leases hinges upon the "point of delivery," which (it argues) is the point where the gas is

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8/ References are to Enron's Amendment to its Additional Statement of Reasons, filed on Nov. 28, 1989.

measured for entry either into a transportation pipeline or for purchase (Answer at 8). Here, the meters for measuring quantity of gas are located at the wellhead rather than at the point where appellant's lines transfer the gas into a gathering system owned by Northwest. BLM concludes accordingly that the point of delivery is at the wellhead and that appellant's lateral lines, which extend downstream from the wellhead to the boundaries of its leaseholds, are transportation pipelines, rather than production facilities.

[1] Section 28(a) of the MLA, as amended, provides:

> Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

30 U.S.C. § 185(a) (1988).

The regulations implementing section 28, effective November 8, 1979, broadly defined the term "pipeline" to mean "a line of pipe traversing Federal lands for transportation of oil or gas." 44 FR 58130 (Oct. 9, 1979). This term included trunk lines, gathering lines, and related facilities. In response to comments on the regulation objecting to the inclusion of "gathering lines," BLM stated:

> Gathering lines were included in the definition because they are part of an oil and gas pipeline that section 28 of the Mineral

> Leasing Act gives the Secretary authority to include in the rights-of-way granted under the Act. Therefore, gathering lines have not been deleted from the definition of "pipeline." It is recognized that this new procedure is a departure from the past Departmental policy of including gathering lines on leases in the plan of operations on the lease.

44 FR 58126 (Oct. 9, 1979).

This interpretation did not remain in effect for long, however. On July 19, 1980, the Solicitor issued the opinion referred to above examining the legislative history and the Department's historical interpretation of section 28 and concluding that that section "does not apply to pipelines and other facilities located on-lease and used for the production--as opposed to the transportation--of oil and gas." Solicitor's Opinion, supra at 299. In thus concluding that such pipelines and other facilities were not subject to the section 28(a) right-of-way requirements, the Solicitor stated:

> Based on the foregoing analysis, we conclude that sec. 28 of the [MLA] does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities. We believe that a reasonable dividing point between "production" and "transportation" is the point at which the lease operator completes his final processing or storage of the product or, in the case of gas, the point of delivery to the transportation pipeline. Thus, "production facilities" include an operator's storage tanks and processing equipment, and oil and gas pipelines upstream from any of the operator's tanks and equipment or, in the case of gas, upstream from the point of delivery. [Emphasis supplied.]

Id. at 303. From this, it is clear that rights-of-way are required for on-lease oil and gas "transportation facilities." Gas Company of New

Mexico, 88 IBLA 240, 242-43 (1985); 9/ accord, Exxon Corp., 97 IBLA 45, 52-53, 94 I.D. 139, 143-44 (1987), aff'd, Exxon Corp. v. Lujan, 730 F. Supp. 1535 (D. Wyo. 1990). It is equally clear that rights-of-way are not required for on-lease "production facilities."

Based on the Solicitor's Opinion, supra, Departmental regulations were amended in 1980 as follows: "Pipeline means a line of [sic] traversing Federal lands for transportation of oil or gas. The term includes feeder lines, trunk lines, and related facilities, but does not include a lessee's or lease operator's production facilities located on his lease." 43 CFR 2880.0-5(i). 10/ Thus, the type of "pipeline" for which a right-of-way

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9/ In Gas Company of New Mexico, supra at 244, we reviewed the Solicitor's Opinion, supra, holding that construction of pipelines either for transportation or gathering purposes on a Federal lease by an individual other than the lessee or operator is authorized only upon the acquisition of a right- of-way grant pursuant to section 28(a) of the MLA, supra. That is, the right to construct gathering lines within the leased premises is a right running only to the oil and gas lessee or the approved operator. Id. at 243-44.

10/ There is no reason to hold that Enron's lateral lines are "feeder lines" or "trunk lines" under that regulation. Although the regulations do not define those terms, commentators have discussed them, albeit in the context of oil pipelines:

"Types of oil pipelines include: lead lines, from pumping well to a storage tank; flow lines, from flowing well to a storage tank; lease lines, extending from the wells to lease tanks; gathering lines, extending from lease tanks to a central accumulation point; feeder lines, extending from leases to trunk lines; and trunk lines, extending from a producing area to refineries or terminals."

8 Williams and Meyers, Oil and Gas Law, Manual of Oil and Gas Terms 909 (1991) (emphasis supplied).

Williams and Meyers also states that a synonym of "trunk line" is "transmission line" and defines the latter term as a "pipe line extending from a producing area to a refinery or terminal." Id. at 1295, 1301.

The record indicates that Enron's lateral lines do not extend from the producing area to refineries or terminals and are thus not "trunk" lines under 43 CFR 2880.0-5(i). Nor do they extend from leases to trunk lines.

must be secured under section 28(a) of the MLA does not include "lessee's or lease operator's production facilities located on his lease." These regulations remain in effect.

As indicated above, "production facilities" are defined as follows in the regulations:

> Production facilities means a lessee's or lease operator's pipes and equipment used on his lease solely to aid in his extraction, storage, and processing of oil and gas. The term includes * * * gathering lines * * * upstream from the point of delivery. The term also includes pipes and equipment, such as water and gas injection lines, used in the production process for purposes other than carrying oil and gas downstream from the wellhead. [Emphasis supplied.]

43 CFR 2880.0-5(k). Thus, "gathering lines" situated on-lease upstream from the point of delivery are, by definition, production facilities not requiring rights-of-way under section 28(a) of the MLA, supra.

[2] We conclude that Enron's lateral lines are properly considered to be gathering lines. Although the term "gathering line" is not defined in the regulations, "gathering" is defined in the royalty regulations as "the movement of lease production to a central accumulation or treatment point on the lease, unit, or communitized area, or to a central accumulation or treatment point off the lease, unit, or communitized area as approved by

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fn. 10 (continued)
Instead, they extend within each lease from the wellhead to the connection point with Northwest's gathering system, which in turn extends from the lease to Northwest's trunk lines. Thus, we cannot find that Enron's lateral lines are "feeder" lines under that regulation.

BLM or MMS OCS operations personnel for onshore and offshore leases, respectively." 30 CFR 206.101; 206.151. The function served by Enron's lateral lines falls within this definition, as they move lease production to a central accumulation point on each lease. That point is the interconnection with Northwest's gathering system, where the lines meet other lateral lines from other wells on the lease.

Additionally, Federal courts have addressed what a "gathering line" is in several other contexts. In Hamman v. Southwest Gas Pipeline, Inc., 721 F.2d 140 (5th Cir. 1983), the U.S. Court of Appeals for the Fifth Circuit examined whether a line was a gathering line for purposes of determining whether a pipeline was subject to the safety regulations promulgated under the Natural Gas Pipeline Safety Act (NGPSA), 49 U.S.C. § 1671-1687 (1988). The definition was pivotal, as gathering lines are exempt from the NGPSA. In Hamman, Southwest Gas contended that its line, called the "Worthington Lateral," was a gathering line and thus exempted from the NGPSA. Southwest's line did not transport gas from a gas well, but rather from a block valve, which, through a series of pipes, eventually leads to several wells. Southwest maintained that this indirect connection to wells satisfied the definition of "gathering line." The Fifth Circuit disagreed, holding that the gathering line exception to NGPSA was restricted to pipelines that connect a transmission line to a gas well. Hamman v. South-western Gas Pipeline Inc., supra at 143. Under the NGPSA, a gathering line is defined "as a pipeline that transports gas from a current production facility to a transmission line or main." 49 CFR 192.3 (1982).

The court observed that although "current production facility" was not defined by regulation, "it appear[ed] to mean 'gas well.'" Hamman v. Southwestern Gas Pipeline, Inc., supra at 143.

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1988), specifically exempts the "production" and "gathering" of natural gas from the Federal Energy Regulatory Commission's (FERC) jurisdiction over pipelines. 11/ Addressing this exemption, the Fifth Circuit stated:

> In determining whether this statutory exemption applies, the Commission must make a factual determination whether a company's primary function consists of interstate transportation of gas or some other activity. Ben Bolt Gathering Co., 26 F.P.C. 825, 827 (1961), aff'd, 323 F.2d 610 (5th Cir.1963). This "primary function test" involves a case by case consideration of all the facts and circumstances of the particular case rather than the application of any overarching bright line standards.

EP Operating Co. v. FERC, 876 F.2d 46, 48 (5th Cir. 1989). The court noted that FERC had identified several relevant considerations to aid in that determination, including the diameter and length of the pipeline, the location of compressors and processing plants, the extension of the facility beyond the central point in the field, the location of wells along all or part of the facility, and the geographical configuration of the system. The court held that "[t]he true test of primary function is whether, with

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11/ Section 1(b) of the Natural Gas Act provides:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

reference to the specific facts and circumstances of [a] particular line, its primary function is gathering." Id. at 49.

In Ben Bolt Gathering Co. v. Federal Power Commission, 323 F.2d 610 (5th Cir. 1963), the Federal Power Commission (FPC), FERC's predecessor, rejected Ben Bolt's claim that it was a gatherer, relating that, "in the ordinary concept of the word[,] 'gathering' as used in the natural-gas industry * * * means * * * the collecting of gas from various wells and bringing it by separate and individual lines to a central point where it is delivered into a single line." Id. at 611. Examining Ben Bolt's operation, FPC concluded Ben Bolt

> cannot validly claim that it functions as a "gatherer"; it clearly is primarily engaged in the purchase of 'gathered' gas delivered into a 'single line' for transportation from the area of production to the point of sale to a major pipeline company, Natural [Gas Pipe Line Company], for further transportation in interstate commerce.

Id.

We find these authorities instructive. Enron's lateral lines qualify as gathering lines under any of the various standards identified above. First, they move lease production to a central accumulation point on each lease. See 30 CFR 206.101; 206.151. Second, they connect to gas wells. See Hamman, supra at 143. Third, they bring gas "by separate and individual lines to a central point where it is delivered into a single line." See Ben Bolt Gathering Co., supra at 611. Finally, there is no evidence in the record that the primary function of the lateral lines is anything but gathering. See EP Operating Co. v. FERC, supra at 48-49. We conclude that Enron's lateral lines are "gathering lines" for purposes of the regulatory definition of "production facilities" in 43 CFR 2880.0-5(k). 12/

[3] The inquiry is not complete, as the regulatory definition of "production facilities" also requires, in the case of gas, that the gathering line be located "upstream from the point of delivery." 43 CFR 2880.0-5(k). Thus, Enron's lateral lines are exempt from right-of-way requirements as "production facilities" only if they are also located "upstream from the point of delivery."

In the decision under appeal, the State Office held, in effect, that the "production accounting measurement point," in this case deemed to be the meter at the wellhead of each well, was the "point of delivery." As Enron points out, neither the regulations, the Solicitor's Opinion, supra, nor the BLM Manual make any mention of using the production accounting measurement point as the point of delivery. On appeal, BLM appears to acknowledge that, as a general matter, the point of delivery and the production accounting measurement point are not the same, but asserts that, in this case, they do coincide (BLM Answer at 3 n.1). We agree with Enron that there is no legal basis for using the production accounting measurement

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12/ We neither hold nor imply that all of these tests must be met for a pipeline to be considered a gathering line.

point as the point of delivery for purposes of determining whether a right- of-way must be secured. Accordingly, BLM's decision must be set aside. 13/

In its answer, BLM states that it

> interprets "point of delivery" as used in its regulations to refer to the point at which the quantity of gas in the first transfer of custody from the lessee to a transportation pipeline or a purchaser is measured. [BLM] presumes that the last meter before the juncture of the lessee's line and the facilities of a purchaser or carrier is the point of delivery, unless the lessee establishes otherwise.

(BLM Answer at 8). In support of its argument, BLM assumes that measurement of the volume of gas and delivery of the gas are closely related, such that where one is found, the other is found too. BLM reasons:

> We submit that no prudent businessman in the oil and gas industry or otherwise would contract to accept or make delivery of valuable property without a means of quantifying the amount delivered. Implicit in the concept of delivery is measurement of the quantity delivered, and in the absence of measurement there has been no delivery. Otherwise, no purchase price, transportation fee or failure to deliver argument could be established.

Id. at 9.

13/ As it was improper to use the production accounting measurement point as the point of delivery, it is irrelevant that BLM might have agreed to a change in production accounting measurement points to match the contract agreement (Decision at 2). Use of such point, whether approved or not, would be improper.

It does not necessarily follow from this that the point of measurement is the point of delivery. As Enron points out, there are other purposes of metering on the lease, including measuring production amounts for royalty purposes, so that production later commingled from several leases can be allocated back to the individual lease from which it was produced. Allocating production back to the specific lease from which it is produced is critical, as lessee must account for royalty on a lease basis. It appears here that Enron has placed meters at each wellhead on the various leases so that it can allocate production back not only to the individual lease, but also to each individual well on the various leases. Accurate measurement of production from an individual well may also be important in determining details of the geologic structure being drained.

More importantly, we find no support in the regulations for placing the point of delivery at the last meter before the juncture of a lessee's line and the facilities of the purchaser or carrier. Such policy might, as demonstrated in this case, move the delivery point substantially upstream, depending on where the meter is placed, or a lessee could presumably move the delivery point downstream by placing another meter downstream, thereby making the new meter "the last meter before the juncture of the lessee's line and the facilities of a purchaser or carrier." We see no justification for such a rule, which arbitrarily locates the point of delivery without reference to the facts of the particular case.

In closely related arguments, BLM asserts that there is a need for a "bright line" defining when on-lease facilities require a right-of-way, and that its interpretation should be affirmed because it promotes administrative uniformity and order by providing a definitive point at which delivery takes place. The administrative convenience of such an approach notwithstanding, it cannot be affirmed here, as we find no justification for it in the regulations, and as the record does not support the conclusion that delivery actually took place at the wellhead.

Although 43 CFR 2880.0-5(k) refers to "point of delivery," the BLM Manual says that a right-of-way is required for facilities that are "downstream from the sales (custody transfer) point." BLM Manual 2801.32.C.1.g.2. To the extent that these points may be different, the regulation governs. See Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986).

On the record before us, we cannot determine where the point of delivery is. We note that the purchase "contract usually contains express provisions as to the place and conditions of delivery of the product bought and sold." Williams, Oil and Gas § 724.3 (1991). The record does not contain a copy of the contract between Enron and Northwest or excerpts relevant to determining the point of delivery. Without it, we are unable to reconcile what the record does indicate. For example, Enron asserts that it owns the lateral lines and maintains title, custody, and risk of loss for the gas until the gas is received at the interconnection with Northwest's gathering system, at which point custody and risk of loss for the production is transferred to Northwest. BLM does not dispute these facts, which suggest that the point of delivery was at the point of interconnection with the Northwest gathering system. However, Enron also states that "Northwest accepts gas for delivery at the wellhead," and that "Northwest operates the facilities installed by Enron for the connection of the wells to Northwest's gathering system" (Enron's Aug. 17, 1989, Letter to State Director at 2-3). If true, these facts could undercut Enron's position that the wellhead should not be regarded as the point of delivery.

As BLM's decision is not based on a thorough examination of the location of the point of delivery, it is set aside. It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. On remand, BLM should reexamine the controlling question of where the point of delivery is in light of the terms of the renegotiated agreement, allowing Enron an opportunity to supplement and clarify the record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further review.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge